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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

-v.-

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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ARGUMENT

Four customer groups and FERC have filed briefs in opposition to the MTA's Petition for Certiorari.[1] Vitally interested in retaining the preference power themselves, these groups attempt to have this Court deny the petition by suggesting that this case involves nothing more than "a single disappointed litigant." *See,* MEUA Br. p. 3; *see also* MMWEC/CMECC Br. p. 4. But there is more at stake than the entrenched preference customers would have one believe. This is the first interpretation of the phrase "public bodies" under the NRA. The final determination will affect not only in-state and out-of-state governmental agencies otherwise eligible to receive Niagara Power, but also the distribution of hydropower under other federal preference legislation.

1. The customer groups are the Municipal Electric Utilities Association of New York State ("MEUA"), Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative ("MMWEC/CMEEC"), and New Jersey Preference Boroughs ("NJ").

The far-reaching impact of this determination requires a decision by this Court. Absent such direction, uncorrectible misallocations of a most valuable asset will continue, and a demonstrably erroneous decision with vast economic and negative environmental impact will be used as a guideline for allocations.

We will first respond to the "procedural" arguments the parties rely upon in opposing MTA's Petition, and then very briefly address only a few of the most egregious statements in connection with the merits of the Second Circuit's determination.

(1) **The amounts involved.** MEUA argues that since the "loss" to the MTA may be *only* $6 million annually, the stakes involved in this case are not sufficiently large to justify the intervention of this Court. MEUA Br. p. 4.[2] But the Niagara project produces over 14.6 billion kilowatt hours of energy; and the savings, by reason of the cost differential between hydropower and conventional power, amount to over a quarter of a billion dollars annually. MTA Pet. p. 8.[3] No party in opposition has cited any support for the claim that certiorari should be granted only if the petitioner by itself has a large enough stake to support the review. Rather, the overall economic impact is what should be considered, and the effect here is more than enough to make this a significant case for review.

(2) **The number of agencies involved.** Three of the opposing parties claim that there is no other governmental agency which would be affected by this Court's review of the Second Circuit's determination. MMWEC/CMEEC Br. pp. 4-5; MEUA Br. pp. 2-4. They are not only mistaken, but also less than candid.

2. MMWEC and CMEEC admit that this case involves the allocation of a valuable resource (MMWEC/CMEEC Br. p. 5, n. 4), but go on to attempt to distinguish other cases in which "economic impact" was an element considered in granting certiorari, by saying that in those cases there were other elements which, in part, motivated the Court to grant the writ. There are always multiple elements which together make a case worthwhile for review. Those elements exist here, too; and the economic impact of the decision is one such element.

3. No question has been raised as to the amount of power or total savings involved.

While this very case was before FERC with all these parties actively participating, the Niagara Frontier Transportation Authority ("NFTA"), which operates a mass transportation system in Erie and Niagara counties, moved to intervene out-of-time.[4] FERC denied NFTA's motion because it believed that NFTA's interest was already represented by the MTA in this proceeding.[5] More importantly, in New York State alone, some of the public agencies which the Power Authority is permitted to serve (for just one example, the New York City Housing Authority) also may be adversely affected by the determination below. *See,* N.Y. Pub. Auth. L. § 1005. MTA does not have the information as to government agencies in Massachusetts, Connecticut, New Jersey, and elsewhere that may qualify as public bodies and receive Niagara hydropower, but governmental agencies like the MTA and NFTA surely exist in those States and throughout the country. In sum, the number of governmental agencies affected is much greater than the opposing parties would have the Court believe.

(3) **The lack of conflict among the circuits.** Both MMWEC/CMEEC and MEUA also argue that certiorari should be denied because there is currently no conflict among the circuits, and because no conflict will arise since only the energy distributed under the NRA and not energy distributed under any other federal preference statutes will be affected by review in this case. MMWEC/CMEEC Br. p. 4; MEUA Br. p. 5, n.3. Neither contention is correct.

A conflict between circuits is not a prerequisite to certiorari review. Indeed, in the absence of such a conflict, this Court has in the past granted certiorari because of the "potential importance of a resolution on the merits" of an issue. *See, FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334-35 (1976).

It is completely disingenuous to suggest that the determination of what is a "public body" under the NRA will not impact the

4. Motion to Intervene on Behalf of NFTA, September 22, 1982.
5. Order Denying Motion to Intervene, October 4, 1982, p. 2.

determination of what is a "public body" under other federal power acts. Perhaps the issue can best be put to rest by noting that in this case MMWEC, CMEEC, and MEUA relied extensively on decisions involving other federal preference statutes to support their argument that the term "public bodies" should be restrictively interpreted.[6] Ironically, in its Brief in Opposition to the Cross Petition, MEUA relies on a case interpreting the Bonneville Project Act to support its reading of the term "public bodies" under the NRA. MEUA Br. in Opp., No. 86-942, p. 4.[7] The intervenors have urged that the authorities in respect of other federal power acts may be relevant in interpreting the NRA; applying the same test, this Court's review of the NRA language should have an effect on the determination of what is a "public body" under other federal power acts.

(4) **This is a case of first impression.** Concerned that the MTA is correct in noting that important cases of first impression can, and often do, warrant review, MMWEC and CMEEC now claim that this is *not* a case of "first impression." MMWEC/CMEEC Br. p. 4. They claim, instead, that this issue was considered by FERC in Opinion 151A and by the Second Circuit in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*"). This position is completely untenable because, as MMWEC and CMEEC know, and as has been pointed out

6. *See, e.g.*, Supplemental Brief of Intervenors in Support of FERC on the "Public Bodies" Issue, pp. 31-40, *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986); MEUA Brief Opposing Exceptions, June 9, 1983, pp. 30-39 (FERC Nos. EL80-19, EL80-24); Reply Brief of MEUA, November 17, 1982, pp. 22-23 (FERC Nos. EL80-19, EL80-24).

7. The citation by MEUA of *Aluminum Co.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) is helpful to the MTA for a second reason. As that case notes (*Id.* at 384), the definition of "public bodies" under the Bonneville Project Act included "states, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof." 16 U.S.C. § 832(b). Under that definition the MTA, as a state agency, would be a "public body." Moreover, the Court in *Aluminum Co.* drew the distinction between public utilities, which are to be given preference, and private utilities (investor-owned utilities) which are not to be given preference. *Id.* at 398-99. In this public/private dichotomy the MTA surely falls on the public, *i.e.* "preference", side.

before, the question of what is a "public body" under the NRA was expressly eliminated from consideration in Opinion 151A on due process grounds for failure to give adequate notice to the MTA. *MEUA* v. *PASNY* (Opinion 151A), 23 FERC ¶ 61,031 (1983). In addition, MMWEC, CMEEC, and MEUA were parties to a stipulation in PASNY which expressly eliminated the public body issue from consideration in that case.[8] There is no basis for any honest suggestion that this is not a case of first impression.

In order to further de-emphasize the novelty of this case and the astonishing about-face by FERC on the "public body" issue, MMWEC and CMEEC also say that the MTA has "mischaracterized" the Commission's earlier decision in *State of Vermont Public Service Board* v. *PASNY*, 55 F.P.C. 1109 (1976), and that the term "public bodies" was not interpreted "simply in accordance with its plain meaning" in that case. MMWEC/CMEEC Br. p. 4. The earlier decision speaks for itself and we believe our characterization is accurate, but it is worth pointing out that FERC itself admits that in reaching its decision in the case before this Court, it "overruled, in relevant part, its prior decision in [*Vermont*]". FERC Br. p.3, n.2.

MTA's Petition already discussed the question of whether the decision below is in error, and, of course, that issue will be addressed in greater detail if this petition is granted. However, in the Briefs in Opposition, there are two points which address the substance of the decision which require some immediate, albeit short, response.

MTA has argued that in interpreting the NRA, the Courts are required to consider the National Environmental Policy Act, the Urban Mass Transportation Assistance Act of 1970, and the Public Utilities Regulatory Policies Act of 1978. MTA Pet. pp. 20-24. MEUA's response that these later statutes cannot be considered to have "repealed by implication" any portion of the NRA (MEUA Br. pp. 6-7) completely misses the point. MTA

8. *See* Letter Agreement, October 24, 1983, "So Ordered" and filed October 28, 1983, *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984).

has not and does not urge "repeal by implication;" on the contrary, it urges that the NRA and the subsequent environmental acts referred to above be read together, and that the Congressional purpose behind each of the acts be harmonized. *See, e.g., Grindstone Butte Project* v. *Kleppe,* 638 F.2d 100 (9th Cir. 1981) (Avoiding conflict between two prior acts and NEPA, and holding that the Secretary of Interior is not only permitted but is required to consider environmental issues in carrying out regulatory functions under pre-NEPA acts); *Hyrup* v. *Kleppe,* 406 F. Supp. 214 (D. Colo. 1976), *aff'd,* Nos. 76-1452, 76-1767 (10th Cir. Nov. 7, 1977) (Recognizing and implementing the court's plain duty to read two acts to avoid a conflict between them, and expressly finding that the "public interest" requirement in an earlier statute included such restrictions as might be necessary for the protection of the environment as outlined in the later acts).

As their ultimate answer, the parties to this case have and continue to argue that the MTA is not in the correct forum and that it should petition Congress, not the Courts, to achieve its desired result. *See* MMWEC/CMEEC Br. p. 6; N.J. Br. pp. 3-4. We do not agree that we are not entitled to judicial relief from administrative and judicial error. In their most recent repetition of the "go to the Congress" suggestion, MMWEC/CMEEC rely on *FPC* v. *Texaco Inc.,* 417 U.S. 380 (1974), a case that is clearly distinguishable. In the *Texaco* case, Congress had attempted after the passage of the Natural Gas Act to exempt small producers from that Act, but that exempting legislation had been vetoed and Congress had failed to override the veto. Given that legislative history, this Court was understandably reluctant to "insert itself into the debate." 417 U.S. at 400-401. That is not at all the case here. There is no reason why this Court should not apply the principles underlying the NRA and subsequent legislation, along with the plain meaning of the NRA, to obtain a sensible reading of "public bodies."

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the petition for certiorari, the petitioner's request should be granted.

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